IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-7005

TONY LEROY WATKINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT IN FORMA PAUPERIS

Federal Defender Program
Suite 1812
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P. Bruce Kirwan
Attorney for Petitioner
Tony Leroy Watkins

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SUPREME COURT OF THE UNITED STATES
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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Tony Leroy Watkins, respectfully prays for leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 of the Supreme Court of the United States. This Motion is made pursuant to 28 U.S.C. §1915 and 18 U.S.C. §3006A(d)(6).

In support of this Motion, Petitioner shows the following:

1. Petitioner is a person for whom counsel was appointed in this case by the United States Magistrate for the Northern District of Georgia pursuant to 18 U.S.C. §3006A;

2. Petitioner is a person for whom counsel was appointed in this case by the United States District Court for the Northern District of Georgia to pursue an appeal to the Fifth Circuit Court of Appeals pursuant to 18 U.S.C. §3006A; and

3. Petitioner remains indigent and has advised counsel in writing of his desire that a petition for writ of certiorari be filed.

Respectfully Submitted,

P. Bruce Kirwan
Attorney for Petitioner
Tony Leroy Watkins

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-titled case on June 1, 1976.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is not reported. A copy of the Court's opinion is attached as Exhibit "A" to the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 1, 1976. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in admitting relevant evidence where its probative value was substantially outweighted by the danger of unfair prejudice and confusion of the issues.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case concern the new Federal Rules of Evidence and are found in Title 28, United States Code, Rule 105 which provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

And

Title 28, United States Code, Rule 403 which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Petitioner, Tony Leroy Watkins, was indicted by the federal grand jury for the Northern District of Georgia on January 7, 1975 in a two-count indictment charging petitioner with violating Title 18, United States Code, Sections 472 and 473. Count One of the indictment charged petitioner with possessing, on or about August 23, 1974, with intent to defraud, four United States saving bonds which contained forged endorsements; while Count Two charged petitioner with knowingly transferring these four savings bonds, on or about August 27, 1974, which contained forged endorsements with the intent that the bonds be passed as true and genuine obligations of the United States. Petitioner was arraigned on June 27, 1975, and

entered his plea of not guilty to the indictment. Also on this date, the Federal Defender Program, Inc. was appointed by the United States District Court for the Northern District of Georgia to represent petitioner.

On September 23, 1975, the case came on for trial before the Honorable William C. O'Kelley. The trial continued on September 24, 1975 and after hearing the evidence, the jury returned a verdict of not guilty as to Count One of the indictment but guilty as to Count Two of the indictment.

Petitioner was sentenced by Judge O'Kelley on November 5, 1975, to the custody of the Attorney General for a period of three (3) years and that the execution of this sentence would commence to run from the expiration of the state sentence petitioner was then serving.

The evidence developed at the trial indicated that on August 15, 1974, Mr. Joseph Lee Camp, Area Director for the Occupational Safety and Health Administration, Department of Health, had forty (40) United States savings bonds made payable to himself and his wife, Mrs. Martha G. Camp, with an approximate face value of $2,250.00, stolen from his coat pocket while he was working at the Regional Office of the Occupational Safety and Health Administration in Atlanta, Georgia. (Tr. 17-19). Mr. Camp had left the savings bonds in his coat pocket when he hung his coat on the office coat rack. When Mr. Camp put his coat on again, approximately a half an hour later, he discovered that the bonds were missing. Mr. Camp notified the Atlanta Police Department that the bonds were missing. (Tr. 20). Mr. Camp identified government's Exhibits 1-A through 1-D (these bonds corresponded with the bonds named in Count One of the indictment) as part of the bonds which had been stolen from his coat pocket on August 15, 1974. (Tr. 22). Mr. Camp also identified government's Exhibit No. 2, a United States savings bond in the amount of $25.00 and also identified government's Exhibit No. 3, a package containing 31 United States savings bonds, as part of the bonds which were taken from his coat. (Tr. 21). Mr. Camp further testified that the endorsement on the back of government's Exhibits 1-A through 1-D was not the signature of his wife, Mrs. Martha G. Camp. (Tr. 22). Moreover, Mr. Camp stated that he had not given petitioner permission to possess these bonds. (Tr. 24). Mrs. Martha G. Camp was then called by the government and she testified that her signature did not appear on the back of government's Exhibits No. 1-A through 1-D, nor had she authorized anyone to sign her name on the back of these bonds, nor had she given anyone permission to possess these bonds. (Tr. 25-26).

Next the government called Special Agent Barry Sternberg of the United States Secret Service who stated that his investigation of the case had begun on August 24, 1974 when he received a telephone call from an informant who told Sternberg that he knew a person by the name of "Tony" who had approximately $3,000.00 worth of stolen bonds payable to Joseph Camp and that this individual was trying to locate a buyer for these bonds. (Tr. 27-28). As a result of this conversation, Agent Sternberg introduced Agent Dwight Ellison to the informant so that a meeting could be set up to obtain the stolen bonds. (Tr. 28). On August 27, 1974 Agent Sternberg arrested petitioner after the bonds had been transferred to Agent Ellison. (Tr. 28-29).

After a Jackson v. Denno, 378 U.S. 368 (1964) hearing, the government declined to introduce into evidence an alleged statement made by petitioner to Agent Sternberg. (Tr. 30-69).

Next the government called Special Agent Dwight Ellison of the United States Secret Service who testified that, while in an undercover role, he met petitioner and the informant

at the West End Mall in Atlanta, Georgia. (Tr. 94-95). Agent Ellison stated that he entered an automobile driven by petitioner and he asked petitioner if he had the "stuff". (Tr. 96). Petitioner replied in the affirmative and reached under the front seat and handed Ellison a package containing the stolen bonds. Petitioner also told Agent Ellison that he had not signed the four bonds but indicated that "they were signed by a friend of his who had attempted to get them cashed but she did not have any success because she did not have sufficient identification". (Tr. 97). Petitioner told Ellison that he would sell the $2,250.00 worth of savings bonds for about one-third the dollar value. (Tr. 97). Petitioner indicated that he did not know what one-third of the $2,250.00 would be, but indicated that he would take about $750.00. Petitioner further indicated that he was "not familiar with these type dealings". (Tr. 97). Agent Ellison then told petitioner that he could only pay $400.00 for the bonds since that amount represented all the cash that he had. Petitioner indicated that if Agent Ellison could get an additional $75.00 he would go along with the deal. Petitioner indicated that he would keep the $75.00 for himself and would give the $400.00 to the people who had given him the bonds. (Tr. 98). Agent Ellison after receiving the package of bonds, left petitioner's car for the purpose of obtaining the $400.00, and then gave a prearranged signal to other Secret Service agents who then arrested petitioner. (Tr. 99).

Petitioner presented no evidence at the trial.

REASONS FOR GRANTING THE WRIT

The Decision Below Failed to Consider Whether Provisions of the Federal Rules of Evidence were Applicable.

It is well settled that a district court has wide discretion in determining relevance and materiality, and its ruling will not be disturbed in the absence of an abuse of discretion. United States v. Bell, 510 F.2d 1095 (5th Cir. 1975). Moreover, in ruling on evidentiary matters, the trial judge must balance the probative value of testimony against potential prejudice, and his exercise of discretion will not be disturbed on appeal save for grave abuse. United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973). However, Rule 403 of the Federal Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

It appears, therefore, that the trial court may exclude relevant evidence if its probative value is substantially outweighted by the danger of unfair prejudice or confusion of the issues. Petitioner contends that the trial court erred when it allowed the government to introduce its Exhibit No. 3 which contained 31 savings bonds which were not named in the indictment. While petitioner realizes that the 31 savings bonds were part of the package which was given by petitioner to the undercover Secret Service agent, petitioner contends that the admission of these other bonds was highly prejudicial to him in that it was evidence of another crime not contained in the indictment. It is clear that petitioner's possession of these 31 savings bonds violated Title 26, Georgia Code, Section 1806 which defines the

offense of theft by receiving stolen property. In the absence of redeeming probative value, exclusion of evidence because of its capacity for prejudice has long been the practice. See, e.g. International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 459 (1st Cir. 1963), cert. denied, 375 U.S. 820 (1963). Since the Advisory Committee's Notes to Rule 403 indicate that "unfair prejudice" means an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one", petitioner contends that the introduction of evidence that would infer guilt of another crime would lead a jury to base its decision on an improper basis. Moreover, Rule 105 of the Federal Rules of Evidence states:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Petitioner contends that, while it did not request a cautionary instruction as to the admissibility of the other savings bonds contained in the United States Exhibit No. 3, the court should have given a cautionary instruction so that the jury could not be confused as to the relevancy of this exhibit. Accordingly, because of the prejudicial effect and confusion of the issues, which resulted from the admission of government's Exhibit No. 3, the district court abused its discretion in admitting United States Exhibit No. 3.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment by the Fifth Circuit Court of Appeals.

Respectfully Submitted,

P. Bruce Kirwan
Counsel for Petitioner
Tony Leroy Watkins

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ORIGINAL COPY

No. 75-7005

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OCTOBER TERM, 1976

TONY LEROY WATKINS, PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

P. BRUCE KIRWAN,
Federal Defender Program,
Suite 1812,
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Atlanta, Georgia 30303.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

This supplemental memorandum is submitted in response to the court's request that the parties address the question of the applicability of Prussian v. United States, 282 U.S. 675 (1931), to this case.

Petitioner has received the supplemental memorandum filed by the United States, and in view of the government's apparent "confession of error", Petitioner adopts the reasoning set forth in the supplemental memorandum submitted by the United States. Therefore, Petitioner respectfully requests that the judgment of the Court of Appeals should be reversed and the case remanded with instructions to dismiss the indictment pursuant to this Court's Rule 40(1)(d)(2).

Respectfully Submitted.

P. BRUCE KIRWAN

NO. 75-7005

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-7005

TONY LEROY WATKINS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court abused its discretion by admitting relevant evidence whose probative value was outweighed by its prejudicial effect.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of knowingly transferring four United States savings bonds bearing forged endorsements, in violation of 18 U.S.C. 473. He was sentenced to three years' imprisonment, to be served consecutively to the state sentence then being served. The court of appeals affirmed per curiam (Pet. App.).

The evidence at trial showed that on August 15, 1974, forty United States savings bonds, with an approximate face value of $2,250, were stolen from Joseph Lee Camp in Atlanta, Georgia (Tr. 17-19). On August 24, 1974, an informant told Secret Service Agent Barry Sternberg that a person called "Tony" possessed about $3,000 worth of stolen bonds payable to Joseph Camp and was trying to locate a buyer (Tr. 27-28). Agent Sternberg

then arranged a meeting between petitioner and Agent Dwight Ellison, at which petitioner told the undercover agent that four of the bonds had been endorsed "by a friend of his" who was unsuccessful in cashing them "because she did not have sufficient identification" (Tr. 28, 73, 97). After some negotiation, petitioner sold the forty bonds stolen from Camp to Agent Ellison for $475. Petitioner was arrested by Agent Sternberg shortly thereafter (Tr. 21, 97-99).

The four bonds bearing the forged endorsements were introduced into evidence at trial (Tr. 22-23, 25-26). In addition, thirty-one of the other unsigned bonds sold by petitioner to Agent Ellison were admitted, although they had not been specified in the indictment (Tr. 87). Petitioner's sole contention is that the district court abused its discretion in admitting into evidence the United States savings bonds not charged in the indictment, claiming that they constituted proof of another crime and that their probative value was outweighed by their "prejudicial effect and confusion of the issues" (Pet. 7).

As petitioner concedes (Pet. 6), the question of admissibility of relevant evidence is addressed to the sound discretion of the trial court, which must determine whether the probative value of the evidence is outweighed by its prejudicial effect. United States v. Rocha, 527 F. 2d 423, 429 (C.A. 5), certiorari denied, No. 75-6432, June 7, 1976; United States v. Chapin, 515 F. 2d 1274, 1284 (C.A.D.C.), certiorari denied, 423 U.S. 1015. Each of the bonds introduced in evidence here was sold by petitioner to Agent Ellison during the same transaction. Since only those bonds bearing a forged endorsement came within the scope of 18 U.S.C. 473, they alone were charged in the indictment. Nevertheless, the remaining bonds were part of the same criminal event and unquestionably were relevant to petitioner's intent. */ Accordingly, the district court did not abuse its discretion in admitting the evidence.

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*/ Even assuming that the unsigned bonds constituted evidence of another crime, the settled rule is that such evidence may be (continued)

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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*/ (continued) admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b), Fed. R. Evid. See, e.g., Nye & Nissen v. United States, 336 U.S. 613, 618. Furthermore, although petitioner contends that the court erred in not giving a cautionary instruction as to the purpose for which the unsigned bonds were admitted, he neither requested such a limiting instruction at trial nor objected to its omission. The trial court was not required to give such an instruction sua sponte. See Petley v. United States, 427 F. 2d 1101, 1106 (C.A. 9), certiorari denied, 400 U.S. 827; United States v. Solomon, 422 F. 2d 1110, 1114 (C.A. 7), certiorari denied sub nom. Sommer v. United States, 399 U.S. 911.